(2)

No. 99-688

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY SANCHEZ, individually and as next friend of Lisa Sanchez,

Petitioner,

v.

LIEUTENANT GARY SMITH, CAPTAIN GILBERT BACA, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY; SELIMO RAEL, PRESIDENT OF NEW MEXICO HIGHLANDS UNIVERSITY, DR. MARGARET GARZA, WILTON ROGERS, NEW MEXICO HIGHLANDS UNIVERSITY, Individually and in Their Official Capacities,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Summary Judgment in favor of the Respondent New Mexico Public Safety Department was proper, when the record taken as a whole could not lead a rational trier of fact to find for the Petitioner, thereby precluding a trial on the merits?

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JURISDICTION

Dorothy Sanchez, individually and as next friend of Lisa Sanchez, filed her petition for writ of certiorari, appealing the order issued by the United States Court of Appeals for the Tenth Circuit which denied her Petition for Rehearing with Suggestion for Rehearing En Banc entered on July 23, 1999. On June 9, 1999, the Tenth Circuit affirmed the Judgment of the United States District Court for the District of New Mexico and its Order Granting Summary Judgment in favor of the Respondents. The Petition for Writ invoked the jurisdiction of this Court under 28 U.S.C. 1254(1) and 2106, seeking review of the Tenth Circuit's order and judgment. These Respondents oppose certiorari jurisdiction and their argument is set forth in their Reasons for Denying Writ.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment and the Fourth Amendment to the United States Constitution are applicable. The Fifth Amendment does not apply to this action. Although Fifth Amendment claims were initially brought against these Respondents, such claims were dismissed by the United States District Court for the District of New Mexico and are not the subject of any appeal. App. E at 43a.

STATEMENT OF THE CASE

The New Mexico Department of Public Safety was contacted by Highlands University to conduct an investigation into the creation and dissemination of a threatening flyer entitled "El Nuevo Mexicano" targeting Highlands University

faculty members and which created an atmosphere of fear on the campus because they threatened bodily harm and were very direct. Aplt. App. at 295, 276, 352 pp. 42-43. Captain Gilbert Baca, Area Commander for the New Mexico State Police District Office, located in Las Vegas, assigned the investigation to Lt. Gary Smith. Aplt. App. at 295, 296. Lt. Smith was responsible for the actual investigation and the manner in which it would be conducted. During the course of Lt. Smith's investigation of the threat letter, criminal allegations involving Dorothy Sanchez were brought to Lt. Smith's attention. As a police officer, Lt. Smith had an affirmative duty to investigate those allegations. Aplt. App. at 301 and 394 p. 48. There were three search warrants served on Dorothy Sanchez, two at her home and one at her office. Petitioner does not raise any issues regarding Search Warrant #1.

SEARCH WARRANT #2

The day after the execution of Search Warrant #1, Dorothy Sanchez was placed on administrative leave with pay from the University. Aplt. App. at 360-361. Dr. Garza found a Highlands University Diploma was issued to William Dale Nolley, Ms. Sanchez's son. The date had been altered by using "white out". Lt. Smith confirmed with the registrar's office that William Dale Nolley had a Highlands University diploma but with a different date than the one found in Ms. Sanchez's office. She also found W-2 forms, issued to someone other than Dorothy Sanchez, in which the numbers appeared to have been erased. Aplt. App. at 323 p. 112; 324 pp. 113-116.

Kathy Martinez, an employee of the university who worked under Dorothy Sanchez, had informed Lt. Smith that

she had been directed, by Dorothy Sanchez, to change a student's grades. Aplt. App. at 329; 330-332. She also told Lt. Smith that she had been ordered by Dorothy Sanchez to alter documents so that students could qualify for first generation financial assistance. Aplt. App. at 343. Kathy Martinez also advised Lt. Smith that she had information from other support services staff that Ms. Sanchez had directed them to amend tax forms so their child could qualify for financial aid. Aplt. App. at 345-346; 410. After Lt. Smith was informed of the altered documents, he consulted with the district attorney who prepared the affidavit which he used when he obtained another search warrant (Search Warrant #2) for Dorothy Sanchez's office on May 3, 1996. Aplt. App. at 392 p.36.

SEARCH WARRANT #3

During the execution of the Search Warrant #2, at Dorothy Sanchez's office, Lt. Smith discovered copies of the suspected hate flyer, "El Nuevo Mexicano", as well as the El Grito and El Machete. They appeared to be either an original or a copy that was superior to those being circulated around the campus. Lt. Smith determined that he needed to get Search Warrant #3. Ms. Sanchez's office contained a very large number of copies and the copies were the best copies he had seen anywhere. Aplt. App. at 396 p. 107, 115; 287-290. The third search warrant for Dorothy Sanchez' home was based on what Lt. Smith found earlier that day at the office. Aplt. App. at 395 p. 103. Lt. Smith had probable cause to look for El Grito and El Nuevo Mexicano. Aplt. App. at 396 p. 105-107.

The subject of this third search warrant was for the threatening letters. Dorothy Sanchez had become a suspect in

the distribution of the threatening flyer and other hate letters. Prior to obtaining the search warrant, Michael Dominguez informed Lt. Smith that there were students copying the El Grito and using Dorothy Sanchez's copying card. The following day, Kathy Martinez verified they could not account for 500 copies. Aplt. App. at 314-318; 337-339. Fred Stoessel also told Lt. Smith that he had asked Dorothy Sanchez for a copy of El Nuevo Mexicano. When he went to get one, she had a stack two or three inches thick. Aplt. App. at 365 p.9.

Lt. Smith informed the Assistant District Attorney, Abigail Aragon, that Dorothy Sanchez had a large number of copies of the hate mail and it was unique because it was the best copies anywhere. Aplt. App. at 396 p. 107. A Canon jet printer in her home had the capability of producing the original El Nuevo Mexicanos that were distributed around campus. Max Baca who was familiar with the capabilities of the jet printer told Lt. Smith that Dorothy Sanchez' bubble jet printer was capable of producing the document. Aplt. App. at 396 p. 107; 397 p. 112; 399 p. 117-118; 387-390.

The Affidavit for search warrant #3 was again prepared by the District Attorney's office. Lt. Smith gave the prepared inventory and return of service for search warrants #2 and #3 to the District Attorney, as requested. He expected the district attorney's office to file them in District Court. Aplt. App. at 400 p. 121; 401 pp. 130-131; 287-290. Assistant District Attorney Abigail Aragon had prepared a Motion to Seal Affidavit for Search Warrant, Search Warrant and Return and the corresponding Order. Aplt. App. at 214,215.

As far as Lt. Smith knew, law enforcement did not have anyone with a computer crimes expert who could make

a mirror image of Dorothy Sanchez's computer. It wasn't until December of 1996 that the Albuquerque Police Department developed a high tech crime unit. That was why the Plaintiff Dorothy Sanchez did not get her computer back until March 5, 1997. Aplt. App. At 396 p. 108; 400 p. 124.

REASONS FOR DENYING WRIT

Rule 10 of the Rules of the Supreme Court of the United States specifically states in part that "[A] petition for a writ of certiorari will be granted only for compelling reasons". It also advises that "[R]eview on a writ is not a matter of right, but of judicial discretion". Furthermore, the rule also provides that "[A] writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law."

This Petition for Writ of Certiorari has not satisfied the requisite criteria to justify review by the United States Supreme Court. Rather, the Petition rests on the arguments of incomplete consideration of the record (Pet. at 7); the misapprehension of the facts of the case by the Tenth Circuit Court of Appeals (Pet. at 7,8), the amount of facts provided for consideration by the Court (Pet. at 8); the Court of Appeal's failure to specifically address each of the Petitioner's sub-issues and arguments (Pet. at 11); reargues the same sub-issues raised before the District Court and the Court of Appeals (Pet. at 12,13,18 and 21); and issues of admissibility of the evidence raised for the first time in this forum. (Pet. at 10)

A Writ of Certiorari is not granted merely to review the evidence of inferences drawn from it, nor where there is no conflict between the decisions of the circuit courts of

appeals. General Pictures Co. v. Electric Co., 304 U.S. 175 (1938). It is not for the United States Supreme Court to reverse a Court of Appeals because if it had been in the place of the Court of Appeals, it would find the record tilting one way rather than the other. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

Certiorari is granted only "in cases involving principals the settlement of which is of importance to the public as distinguished from parties and in the cases where there is real and embarrassing conflict of opinion and authority between the Courts of Appeals." Id. at 502. One of the principal purposes of certiorari jurisdiction is to resolve conflicts among the United States Courts of Appeals concerning the meaning of provisions of federal law. Braxton v. United States, 500 U.S. 344, 347 (1991). The subject Petition for Writ does not encompass any of these criterion.

Petitioner's argument that this court has reversed and remanded courts where fundamental rights or clear legal violations have been misapprehended by lower courts is neither supported by Petitioner's reference to Oestereich v. Selective Service Local Board, 390 F.2d 100 (10th Cir. 1968), rev'd 393 U.S. 233 (1968) nor to the issues and circumstances of this case.[1] Oestereich, involved the first interpretation of §10 (b)(3) of the Military Selection Service Act of 1967 and whether pre-induction review was precluded as it applied to the facts of that particular case. The Court's rationale addressed a statutory mandate, the interpretation of the Selective Service Board's actions and whether or not such

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[1] Oestereich was erroneously cited in Petitioner's Writ at page 7, as 390 F.2d 100 (10th Cir. 1968), rev'd, **396 U.S. 460 (1969)**.[Emphasis Added]

actions were a procedure allowed by the regulations. This case involved what the Supreme Court stated as a "clear departure by the Board from its statutory mandate". Id. at 238. In its Order and Judgment, the Court of Appeals did not decide an important federal question that has not been or should be settled by this Court. See Rule 10(c) of the Supreme Court Of The United States.

Breen v. Selective Service Local Board, 396 U.S. 460 (1970) involved the same set of circumstances as Oestereich. The District Court granted the Motion to Dismiss and the Court of Appeals affirmed. While this appeal was pending, the United States Supreme Court rendered its decision in Oestereich. Even though Petitioner relied on Oestereich, the Court of Appeals affirmed the District Court's dismissal of the suit. The Supreme Court granted certiorari because it concluded that Oestereich governed petitioner's case. Again, this is not the case before the Court.

It is not for this United States Supreme Court to second guess the basis and considerations of the Tenth Circuit Court of Appeal's decision which was based on its review of the parties' briefs, the appendices, the district court's oral explanation of its judgment, the district court's opinion and the separate reply briefs. App. E. at 47a and App. D at 19a. The Tenth Circuit's Order and Judgment is not in conflict with any other circuits or with the United States Supreme Court. Likewise, this matter does not involve matters of great legal importance to the public that need to be addressed by this Court.

ARGUMENT

I. The United States Court of Appeals For The Tenth Circuit considered the Petitioners' Reply Briefs prior to issuing its decision.

In its Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc, the Court of Appeals specifically states that the separate reply briefs were reviewed by the panel before it issued its decision. (App. D at 19a) This statement invalidates Petitioners claim that the Court of Appeals Rule 31.4 which discourages separate briefs by non-government parties may have caused incomplete consideration of the appeal.

II. The award for summary judgment in favor of these Respondents does not automatically present a depravation of a fundamental right or clear legal violation.

The Federal District Court found the New Mexico Department of Public Safety Defendants were entitled to qualified immunity for the Plaintiffs' fourth cause of action (4/29/96 search was pretextual and unreasonable; 5/3/96 search of home lacked probable cause, was unreasonable, was a general search; based on pretextual and false statements) fifth cause of action (unreasonable length of time in retaining goods causing the Plaintiffs damage); tenth cause of action (5/3/96 searches and seizures were invalid and violated Plaintiffs' fourth amendment rights because warrants were never returned nor inventory timely made, filed or served), among other state claims. App. B at 11a; C.A. Resp. B. p.12)

In essence, the Petitioner's recurrent Fourth Amendment arguments have not made any substantive transitions to support her writ which purports to argue that the award of summary judgment in favor of these Respondents is tantamount to the automatic deprivation of a fundamental right or that such amounts to a clear legal violation.

One of the consistent complications in the procedural history of this matter is the Petitioners' subjective assessment of select information, groundless or leaping conclusions and editorial comments not otherwise found in the evidence established through discovery. (C.A. Resp. B. p. 3) It was the Petitioner's burden to produce and designate for the lower courts the "specific facts showing that there is a genuine issue for trial". Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Petitioner had the burden of establishing, at a minimum, an inference of the presence of each element essential to the case. Hulsey v. Kmart, Inc., 43 F.3d 555, 557 (10th Cir. 1994). In short, the Petitioner never met her burden.

The district court's function was to determine whether there was a genuine issue for trial, not to weigh the evidence and determine the truth of the matter. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986) There is no genuine issue for trial, when the record ***taken as a whole*** could not lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) [Emphasis Added] The quantity of facts is not a consideration in motions for summary judgment.

The United State District Court properly applied the law to the issues raised in the Second Motion to Dismiss or

Alternatively, Motion for Summary Judgment and Qualified Immunity. After reviewing the sufficiency of the supporting affidavits in light of the totality of the circumstances, the Court of Appeals held that each supporting affidavit provided the magistrate with a substantial basis for concluding probable cause existed to justify the warrants. The court also held that Petitioner failed to show that [as a matter of law] the searches exceeded the warrants. App. E. at 45a.

Petitioner never raised her issue that various "charges" were inadmissible hearsay in any of the lower courts. The absence of any argument or authority on the issue would be deemed the matter abandoned and it should not be addressed on appeal. Farthing v. City of Shawnee, Kan., 39 F.3d 1131 (10th Cir. 1994) Therefore, this new issue of inadmissible hearsay was abandoned before it ever reached the Court of Appeals and cannot be raised for the first time on writ for certiorari.

CONCLUSION

For the foregoing reasons, the Court of Appeals properly affirmed Judgment and Order granting summary judgment in favor the Respondents. There are no compelling reasons for which this Court should grant certiorari. Therefore, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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